Supreme Court, U.S.
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90-719

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

STEVEN IANNACONE,

Petitioner,

v.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEW JERSEY

Thomas E. Doig, Jr.
Counsel of Record
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Attorneys for Petitioner

QUESTION PRESENTED

1. Whether the penalties for a third offender under New Jersey's Drunken Driving laws are so onerous in their cumulative total so as to invoke the right of trial by jury pursuant to the Sixth Amendment of the United States Constitution.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO.

STEVEN IANNACONE, PETITIONER

v.

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, Steven Iannacone, respectfully requests that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of New Jersey denying a petition for certification, thereby affirming the conviction of the defendant of a violation of driving under the influence of alcohol.

OPINIONS BELOW

The opinion of the trial court, (Municipal level is unpublished but appears as Appendix B, page 20a. The matter was then appealed to the Middlesex County Court on a trial de novo and the opinion appears as Appendix B, page 21a through 23a. The petitioner appealed to the Appellate Division of the New Jersey Superior Court and the opinion appears as Appendix B, pages 24a through 32a.

The petitioner applied for certification to the New Jersey Supreme Court which was denied. (Appendix B, page 33a) None of the above opinions were published. However, directly applicable to this case and decided only one week prior is the case of State v. Hamm published at 121 N.J. 109 (1990).

JURISDICTION

1. The judgment of the Supreme Court of New Jersey was entered on August 6, 1990 (Appendix B, infra, 33a). It is final by its terms.

2. The federal question was raised by way of motion at the municipal court level (Appendix B, 20a), again in the Law Division Appendix B, 21a), once again at the Appellate Division (Appendix B, 31a) and finally in petitioner's application for certification to the New Jersey Supreme Court as reproduced in relevant part at Appendix C, pages 35a through 38a.

LIST OF PARTIES

The parties listed in the caption are the only parties involved; however the Governor of the State of New Jersey and the New Jersey Attorney General have been put on notice by service of a copy of this petition upon each.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to * * * be confronted with the witnesses against him.

2. The Fourteenth Amendment to the United States Constitution provides in

relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

3. Paragraph (a)(3) of the New Jersey drunken driving laws, N.J.S.A. 39:4-50 provides in relevant part:

> A person who operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood * * * shall be subject: ...
>
> (3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the

highways of this State for 10 years.

STATEMENT

1. The defendant was arrested for drunken driving in the Township of Monroe, in the County of Middlesex and State of New Jersey on May 15, 1988. In a trial at the municipal court the petitioner made application for a jury.

2. At some point prior to this hearing, Francis X. Moore, Esquire, an attorney practicing in Monmouth County, New Jersey had begun the trial and appeal process that eventually resulted in the opinion set forth in State v. Hamm, supra. This case raised the question of whether the total cumulative penalties for a third time conviction of New Jersey's drunken driving law would invoke the right to a jury trial.

3. The petitioner proceeded by taking an appeal to the Law Division of the Superior Court of New Jersey pursuant to a de novo procedure as required by the Rules of Court. At this hearing the Superior Court Judge, C. John Strumsos, again denied the request for a jury trial. (Appendix B, infra, 21a through 23a)

4. The petitioner then appealed to the Appellate Division of the Superior Court. The appeal was taken on four different grounds, one of which again raised the issue of whether the petitioner was entitled to a jury trial. (Appendix B, infra, 24a through 32a) The Appellate Division affirmed the decisions below, but noted that State v. Hamm was pending. (Appendix B, 32a) However, the Appellate panel denied a stay of the penalties.

5. The petitioner learned that the New Jersey Supreme Court had granted certification while petitioner's appeal was pending. He therefore sought direct certification to the New Jersey Supreme Court and asked for consolidation with Hamm, supra. This was denied.

6. The New Jersey Supreme Court announced a stay for all cases pending in the Appellate levels which raised the issue of the question of the applicability of jury trials to either first, second or multiple offenders and specifically stayed the penalties in the petitioner's case.

7. After the affirmation of the trial court by the Appellate Division, the petitioner sought certification with the New Jersey Supreme Court on the same four grounds as raised below and in

particular asked for a reversal based on the denial of the petitioner's right to a jury trial. (Appendix C, 34a through 38a) The decision in that matter in State v. Downie, 117 N.J. 450 (1990) rendered three of the defendant's arguments moot. Essentially the only argument open to the petitioner was the jury trial question, but one month after the New Jersey Supreme Court's decision in State v. Hamm, supra, the petitioner's application for certification was denied. (Appendix B, infra, 33a)

REASONS FOR GRANTING THE PETITION

As a result of his conviction as a third offender under N.J.S.A 39:4-50, the plaintiff is subject to the following penalties:

1. A fine of one thousand dollars;
2. Fifteen Dollars in Court Costs;
3. A one hundred dollar surcharge;
4. An eighty dollar charge to an intoxicated driver resource center;
5. A ten year loss of his driving privileges in the State of New Jersey;
6. He shall be incarcerated for 180 days but shall be allowed to serve 90 days of that sentence in an inpatient alcohol rehabilitation clinic and the remaining time may be served by way of community service;
7. He shall be subject to between twelve and forty eights hours in an Intoxicated Driver Resource Center and required to satisfy their screening, evaluation, referral, program and fee requirements;
8. He shall be subject to annual surcharge upon the return of his license in the amount of one thousand dollars for a period of three years, which surcharge is collected by the New Jersey Department of Motor Vehicles.

In addition to these enumerated penalties, if the screening and evaluation of the I.D.R.C. recommends further treatment, it may exercise control over the defendant for up to a year and require that he attend at least sixteen sessions of counselling at a cost to the defendant ranging between $35.00 and $75.00 per session. In addition to the surcharge as set forth above, petitioner will also suffer enhanced insurance rates.

If the petitioner for any reason elects to drive during the ten year suspension period and is apprehended while doing so, he will suffer additional enhanced penalties applicable only to drivers suspended initially for driving while intoxicated. Under the statute, N.J.S.A. 39:3-40 (Appendix A, 16a through 18a) the enhanced penalty would include

an additional $500.00 fine, an additional one year loss of driving privileges, and up to ninety days incarceration. This would, of course, require a further violation of the law.

In State v. Hamm, supra, the New Jersey Supreme Court enunciated its feeling that these penalties in their cumulative total do not reflect a legislative determination that a third-time violation of New Jersey's statute is a "serious" one, requiring a trial by jury. The petitioner applied for certification to the New Jersey Supreme Court which was denied. (Appendix B, page 33a) None of the above opinions were published. However, directly applicable to this case and decided only one week prior is the case of State v. Hamm published at 121 N.J. 109 (1990).

This is the test set forth in Blanton v. North Las Vegas, 489 U.S. 538, ____ 109 S.Ct. 1289, 1293, 103 L.Ed.2d 550, 556 (1989). In particular at 489 U.S. , 109 S.Ct. 1293, 103 L.Ed.2d 556, Justice Marshall said:

> "Although we did not hold in Baldwin that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense, and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not

puncture the 6-month incarceration line."

The petitioner herein submits that the cumulative total of these penalties does "puncture the 6-month incarceration line".

Even the New Jersey Supreme Court seems to close it's own opinion with self-doubt. It cites Richter v. Fairbanks, 903 F.2d, 1202 (8th Cir. 1990), United States v. Craner, 652 F.2d, 23 (9th Cir. 1981) and State v. O'Brien, 68 Haw. 38, 704 P.2d 883 (1985). In citing these cases it asks the United States Supreme Court to draw the "bright line" that will lay these cases to rest once and for all.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Thomas E. Doig, Jr.
Attorney for the Petitioner

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES

AMENDMENT [VI.]

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses to his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT [XIV.]

1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW JERSEY DRUNKEN DRIVING STATUTES

39:4-50 Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers.

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle

owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than six months nor more than

one year.

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which

application may be granted at the discretion of the director, consistent with subsection (b) of this section.

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for

a violation of this section, the revocation or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. A court that imposes a term of imprisonment under this section may sentence the person convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation program or to an Intoxicated Driver Resource Center or other facility approved by the Director of the Division of Alcoholism in the Department of Health; provided that for a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

A person who has been convicted of a previous violation of this section need

not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

(b) A person convicted under this section must satisfy the screening, evaluation, referral and program and fee requirements of the Division of Alcoholism's Bureau of Alcohol Countermeasures Intoxicated Driving Program Unit, and of the Intoxicated

Driver Resource Center and a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with Rule 7:8-2 of the N.J. Court Rules, 1969, or R.S. 39:5-22. Upon sentencing, the court shall forward to the Bureau of Alcohol Countermeasures <u>within the Intoxicated Driving Programs Unit</u> a copy of a person's conviction record. A fee of $80.00 shall be payable to the Alcohol education, Rehabilitation and Enforcement

Fund established pursuant to section 3, P.L. 1983, c. 531 (C.26:28 2B-32) to support the Intoxicated Driving Programs Unit.

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the Director of the Division of Motor Vehicles. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S. 39:3-40. The person convicted shall be informed orally and in writing. A person shall be required to acknowledge

receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S. 39:3-40. In the event that a person convicted under this section is the holder of any out-of-state driver's license, the court shall not collect the license but shall notify forthwith the director, who shall, in turn, notify appropriate officials in the licensing jurisdiction. The court shall, however, revoke the nonresident's driving privilege to operate a motor vehicle in this State, in accordance with this section. Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or

subsequent violation of this section. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

(d) The Director of the Division of Motor Vehicles shall promulgate rules and regulations pursuant to the "Administrative Procedure Act," P.L. 1968, c. 410 (C.52:14B-1 et seq.) in order to establish a program of alcohol education and highway safety, as prescribed by this Act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be

entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing Criminal Practice, as set forth in the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and the Division of Motor Vehicles, but subject to the approval of the Division of Alcoholism, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall have the capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a certified alcoholism counsellor or other

professional with a minimum of five years' experience in treatment of alcoholism. All centers shall be required to develop individualized treatment plans for all persons attending the centers; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsibility to establish networks with the community alcohol education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Bureau of Alcohol Countermeasures. Upon attendance at an Intoxicated Driver Resource Center, a person shall be assessed a per diem charge of $50.00 for the first offender program or a per diem fee of $75.00 for the second offender program, as appropriate.

The centers shall conduct a program of alcohol education and highway safety,

as prescribed by the Director of the Division of Motor Vehicles.

The Director of the Division of Alcoholism shall adopt rules and regulations pursuant to the "Administrative Procedure Act", P.L. 1988, c. 410 (C.52:14B-1 et seq.), in order to effectuate the purpose of this subsection.

Amended by L.1977, c.29, 1; L.1981, c.47, 1, eff. Feb. 25, 1981; L.1981, c.537, 1; L.1982, c.53, 2, eff. July 1, 1982; L.1982, c. 58, 1, eff. July 6, 1982; L.1983, c. 90, 2, eff. March 11, 1983; L.1983, c. 129, 1, eff. April 7, 1983; L.1983, c. 444, 1; L.1984, c. 243, 1, eff. Jan. 2, 1985; L.1986, c. 126, 1
, eff. Oct. 9, 1986.

39:3-40 Driving when license refused, suspended, revoked or prohibited; motor vehicle license revoked; punishment

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining a driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition. No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

A person violating this section shall be subject to the following penalties:

a. Upon conviction for a first offense, a fine of $500.00;

b. Upon conviction for a second offense, a fine of $750.00 and imprisonment in the county jail for not more than five days;

c. Upon conviction for a third offense, a fine of $1,000.00 and imprisonment in the county jail for not more than 10 days;

d. Upon conviction, the court shall impose or extend a period of suspension not to exceed six months;

e. Upon conviction, the court shall impose a period of imprisonment for not less than 45 days, if while operating a vehicle in violation of this section a person is involved in an accident resulting in personal injury <u>to another person</u>.

Notwithstanding subsections a. through e., any person violating this section while under suspension issued pursuant to R.S. 39:4-50, upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an

additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

APPENDIX B

OPINIONS BELOW

OPINION OF THE TRIAL COURT

AS EXCERPTED FROM TRANSCRIPT OF

DECEMBER 6, 1988

Mr. Doig: Just-if I may-I'm sorry to belabor the point Judge, but just for the record, Judge, I've made these motions before, but if not, I would move at this time for a jury trial. I know how your Honor has to rule, but I'd ask that motion be heard.

The Prosecutor: I would object to that, for the record, that there's nothing that provides for it either in the rules, or in the statutes of this state.

The Court: No, this Court is going to rule that the defendant is not entitled to a jury trial.

ORAL OPINION OF JUDGE STRUMSOS

OF THE MIDDLESEX COUNTY COURT

ON TRIAL DE NOVO

Mr. Doig: I would just make my motion for a jury trial, again, renewing that. This is a third offense for the defendant and therefore he would be subject to more than six months of or a penalty greater than six months of incarceration in the cumulative total.

I don't think your Honor even has a lot of discretion in that, as I read the case law, and therefore, I would expect you to have--

The Court: Is that issue--I kind of had a feeling, as I read through, there are some issues on appeal now that you're awaiting the results of.

Mr. Doig: Well, there are two issues, Judge, before the United States

Supreme Court. Our issue is argued by the State of Nevada. Our Attorney General has filed a amicus curiae brief in that, because--

The Court: What's that, a trial by jury?

Mr. Doig: Yes, your Honor. And I think that's based on was the second offender, equivalent of the second offender. Mr. Iannacone is in a worse position, because he is a third offender, and I think he actually gets a penalty of greater than six months, which under the excellent case law would give him that right.

The Court: I've read the transcript. I understand your arguments, and I'm convinced beyond a doubt that your client is guilty of the offense, and without my going through it, I thought

Judge Brenner below spelled it out in terms of finding your client guilty on that, and I certainly, my independent findings, because I know this is a trial de novo, and also find him guilty for driving under the influence.

OPINION OF THE APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3640-88T2

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

STEVEN IANNACONE,

Defendant-Appellant.

Submitted November 9, 1989
Decided November 29, 1989

Before Judges Drier and Scalera

On appeal from the Superior Court, Law Division, Middlesex County. Thomas E. Doig, Jr. attorney for appellant.

Alan A. Rockoff, Middlesex County Prosecutor, as attorney for respondent (Simon Louis Rosenbach, Assistant Prosecutor,

of counsel and on the letter brief).

PER CURIAM

Defendant appeals from a DWI conviction under N.J.S.A. 39:4-50. Since this was his third conviction, in addition to the usual fines, defendant lost his license for ten years, and was sentenced to a jail term of ninety days which could be served in an in-patient rehabilitation program, plus 90 days of community service. State Troopers had observed defendant swerving three to five times over the lane separation line during the course of a quarter mile. After they stopped and approached the car, the troopers noted an odor of alcohol. Defendant was requested to perform psychophysical tests, but failed to perform them acceptably. He was arrested

and taken to the State Police barracks where he was given two breathalyzer tests, each resulting in a .13 percent reading.

On this appeal defendant raises four points.

POINT I

New Jersey statute section 39:4-50(a) which establishes a per se rule for purposes of admissibility enhances the risk of erroneous convictions placing a defendant at a severe disadvantage in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

POINT II

New Jersey statute section 39:4-50 violates the Due Process Clause of the United States Constitution in that it is void for vagueness.

POINT III

While extrapolation evidence has been eliminated, other expert testimony coupled with extrinsic evidence may still rebut the State's per se case.

POINT IV

The defendant is entitled to the right of trial by jury because of the cumulative penalties associated with a third conviction for D.W.I.

First, the defendant claims that the per se rule for applying the breathalyzer readings violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. His second claim is that the DWI statute is similarly infirm in that it is void for vagueness. Implicit in State v. Tischio, 107 N.J. 504 (1987), State v. O'Connor, 220 N.J. Super. 104 (App. Div. 1984), and State v. D'Agostino, 203 N.J. Super. 69 (Law Div. 1984) (cited in Tischio), is that the Legislature has defined an offense of driving with .10 percent or greater blood alcohol content. This legislative determination is based upon the assumption that such a blood alcohol content will impair a driver's ability to operate a motor vehicle. In O'Connor, we stated:

> the statute does not create a presumption. It flatly prohibits the operation of a

> motor vehicle by any driver whose blood alcohol concentration equals or exceeds .10% and the penal consequences for violations thereof apply without regard to whether the operator's ability to drive a motor vehicle is impaired. [Id. at 105].

Furthermore, in Romano v. Kimmelman, 96 N.J. 66 (1984), it was determined that the breathalyzer used in this case, assuming a scientifically accepted constant breath-alcohol/blood-alcohol ratio, will measure the alcohol content in the subject's blood. The Supreme Court's repeated upholding of the statute forecloses us from adopting either of the first two arguments raised by defendant.

Defendant next contends that the breathalyzer can be attacked on the basis of the error in the proposition that subjects will have a uniform breath-

alcohol/blood-alcohol ratio, and therefore the breathalyzer readings do not accurately measure blood alcohol content. This defense was upheld and explained in State v. McGinley, 229 N.J. Super. 191 (Law Div. 1988), but then overruled in State v. Downie, 299 N.J. Super. 207 (App. Div. 1988), leave to appeal granted 114 N.J. 498 (1989). In Downie, we recognized the possible merit in Judge Haines' decision in McGinley; yet, we were bound by the Supreme Court's rule making authority exercised in Romano v. Kimmelman. Unless or until the Supreme Court, as a result of further scientific evidence, modifies that decision and the accompanying order to all New Jersey courts to recognize the breathalyzer as scientifically accurate, it must be followed. (We understand that Judge

McGann, who was assigned to hold hearings on the accuracy of the breathalyzer, has submitted his findings to the Supreme Court, and that Downie has been reargued). While defendant here may have preserved his rights in the event of a modification of the presumption of validity after the Supreme Court's opinion in Downie, we are still bound by Romano to accept the breathalyzer reading.

We note parenthetically that while the conviction based upon the breathalyzer is sustainable on that ground without additional evidence, the Law Division judge further stated that he would have convicted defendant in the absence of the breathalyzer evidence, on the basis of the trooper's testimony alone. Even if the breathalyzer had been successfully attached causing the readings to be

reduced pursuant to the McGinley factors, the trial judge's determination taken together with the reduced readings, still justified that conviction. N.J.S.A. 39:4-50.1(2).

Lastly, defendant contends that he was entitled to a jury trial in view of the mandatory incarceration imposed upon a third offender under N.J.S.A. 39:4-50. The State notes that Blanton v. North Las Vegas, ___ U.S. ___, 109 S.Ct. 1289, 103 L.Ed.2d 550 (1989), requires jury trials only if the penalty to which a defendant is exposed is incarceration for a period greater than six months, and that lesser offenses are not subject to the Sixth Amendment mandatory right to a jury trial. The issue has not yet been determined under the New Jersey Constitution and is now pending in the Supreme Court in State

v. Hamm, Docket No. 30,040. This Court, however, in State v. Samarel, 231 N. J. Super. 134, 143 (App. Div. 1989), and State v. Linnehan, 197 N.J. Super. 41, 43 (App. Div. 1984), certif. den. 99 N.J. 236 (1985) has determined that a jury trial was not required. Subject to the results in the pending Supreme Court case, we see no reason to depart from these precedents.

Affirmed.

OPINION OF THE NEW JERSEY SUPREME COURT

SUPREME COURT OF NEW JERSEY
C-23 September Term 1990
31,286

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

STEVEN IANNACONE,

Defendant-Petitioner.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-3640-88T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 4th day of September, 1990.

F I L E D: September 6, 1990
Stephen Townsend, Clerk

APPENDIX C
FEDERAL ISSUES RAISED BELOW

EXCERPT FROM DEFENDANT'S BRIEF IN SUPPORT OF HIS PETITION FOR CERTIFICATION IN THE NEW JERSEY SUPREME COURT

C. IN LIGHT OF THE SERIOUS PENALTIES FOR A THIRD OFFENSE OF DRIVING WHILE UNDER THE INFLUENCE, THE TRIAL COURT, THE SUPERIOR COURT AND THE APPELLATE DIVISION ALL ERRED IN NOT GRANTING THE APPELLANT-PETITIONER A JURY TRIAL.

The appellant-petitioner was sentenced to one hundred eighty days in jail with the option of serving ninety days of that sentence in an in-patient rehabilitation program and ninety days of community service. In addition the appellant-petitioner's driving privilege was revoked for a period of ten years, and he was obligated to pay a total of $1,115.00 in fines and costs. Further, the appellant-petitioner was required to satisfy the screening, evaluation, referral, program and fee requirements of the Division of Alcoholism's Intoxicated Driving Program Unit which for a third

offender generally involves in-patient rehabilitation and/or extensive counseling which would subject the appellant-petitioner to fees of several thousands of dollars in addition to the fines and costs as set forth above.

In Blanton v. North Las Vegas, supra, Justice Marshall delineated the right to a jury trial by weighing the penalties to determine if the offense was a "trivial" or "petty" offense as opposed to a "serious" offense. In doing so he determined that the penalty of up to six months or forty eight hours of community service, coupled with a thousand dollar fine, ninety days driving suspension and attendance at an alcohol abuse class was not a "serious" penalty. The driving suspension was thought to be minor if concurrent to the incarceration, but if

not concurrent, the appellant-petitioner was eligible for a "work" license in forty-five days. The alcohol abuse class was termed de minimis. The Court determined that these penalties did not entitle Blanton to a jury trial. At page 1293 of Blanton, Justice Marshall stated:

> "A defendant is entitled to a jury trial in such circumstances (six months jail) if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."

In the case at bar, the contrast to be made is ten years driving suspension as opposed to ninety days; a minimum of one hundred eighty days of incarceration versus two days of community service; screening, evaluation and aftercare versus an alcohol education class.

It is interesting to note the 1982 Senate Law, Public Safety and Defense Committee statement accompanying the statute. On page 147 of the 1989 pocket part to Title 39 of the New Jersey Statutes Annotated, the committee in amending the discovery requirements stated:

> "The penalties facing a person accused of drunk driving as a second or subsequent offender are severe.....The Rule on discovery in municipal courts (R. 7:42[g]) states that when the defendant is subject to imprisonment or some other severe penalty upon conviction, the rule on discovery in criminal cases shall apply."

Thus, there is already a legislative determination that the penalty for second and subsequent offenses constitutes a severe penalty and thus it may be determined that the offense is at least a serious one with regard to second and

subsequent offenders. Therefore, the appellant-petitioner at bar is entitled to a jury trial.